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No. 80-35

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

SAUL M. WEINGARTEN,
Petitioner,

VS.

PAUL BLOCK, MONTEREY PENINSULA HERALD CO., a California Corporation, TOLEDO BLADE COMPANY, an Ohio Corporation, RICHARD B. GIFFORD and MILTON JAQUES,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The sole federal question presented in the petition is whether sufficient evidence supports the California court's application to this libel case of the constitutional privilege enunciated by the United States Supreme Court in *New York Times v. Sullivan* (1964) 376 U.S. 254, 11 L.Ed.2d 686, and subsequent cases.

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OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, affirming the trial court's judgment of nonsuit, is correctly cited in the petition as *Weingarten v. Block, et al.,* (1980) 102 C.A.3d 129, 162 Cal.Rptr. 701. A substantially correct version of that opinion is attached to the petition as Appendix C.[1]

The Petition for Rehearing filed in the Court of Appeal and the Petition for Hearing filed in the California Supreme

[1]A correction of petitioner's Appendix C should be made at pages 15-16, as follows: the final paragraph appearing on page 15 and the first paragraph on page 16 should be shown as footnote number 12; the second paragraph appearing on page 16 should be shown as footnote number 13.

Court were each denied without opinion. (Petitioner's Appendices D and E, respectively).

JURISDICTION

Petitioner's basis for invoking jurisdiction of this Court, as set forth in the petition, is 28 U.S.C., Section 1257(3). (Petition, at page 1).

Petitioner apparently relies for this Court's jurisdiction upon respondents' assertion of their rights under the First and Fourteenth Amendments to the United States Constitution, as interpreted in the case of *New York Times v. Sullivan,* 376 U.S. 254, 11 L.Ed.2d 686 and its progeny. The courts of the State of California have consistently sustained respondents' constitutional claim; no federal claim has been asserted by petitioner at any stage of this litigation, and no constitutional right of petitioner has been denied or abridged by the judgment of the California court.

Respondents acknowledge that a federal question has been raised by them and decided by the State court concerning respondents' rights and privileges under the United States Constitution, and that the Petition for Certiorari has been timely filed. However, the questions stated in the petition concerning petitioner's right to a jury trial and the procedural requirements for a motion for nonsuit (petition, at page ii) are matters of local law over which the United States Supreme Court has no jurisdiction. (See, *Time, Inc. v. Firestone* (1975) 424 U.S. 448, 47 L.Ed.2d 154; *Southern Railroad Co. v. Durham* (N.C. 1924) 266 U.S. 178, 69 L.Ed. 231; *Commonwealth v. Estate of Bosch* (1967) 387 U.S. 456, 18 L.Ed.2d 886).[2]

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[2]Matters of local law will be discussed more fully at pages 19 to 21, infra.

STATEMENT OF FACTS

The facts of the case are stated fully in the opinion of the Court of Appeal (petitioner's Appendix C, at pages 11-14), and in Findings of Fact (petitioner's Appendix B, at pages 2-6).

The Statement of the Case set forth in the petition at pages 2-9 contains numerous inaccuracies and misconstructions of the evidence on record. Thus, respondents offer the following summary of the facts.

Petitioner Saul M. Weingarten was closely associated with the City of Seaside from the mid-1950's until the time of trial in the fall of 1976. He had served as City Attorney for a period of fifteen years prior to his controversial discharge in late 1970. He also served as the only local counsel for Seaside's Redevelopment Agency from the time of its inception, playing a very active and well-publicized role in redevelopment projects and funding.

Weingarten was involved in local and state politics during his long tenure as City Attorney, having run for political office on two occasions. He was recognized in the local community as a civic leader, and his activities received extensive publicity in local newspapers prior to September of 1971. Because of his weekly contact with newspaper reporters, and his close association with reporter Fred Sorri, Weingarten enjoyed significant access to the local news media. In addition, Weingarten refers to himself as a "public attorney" in his pleadings on file in this litigation, and he alleges damage to his reputation as such.

After Weingarten's controversial discharge from the City Attorney position in October of 1970, Weingarten represented a corporation organized to recall from office those members of the City Council who had voted to discharge him. The public controversy over Weingarten's discharge and the subsequent recall election received extensive press

coverage and public comment. Three of the four Council members voting to discharge Weingarten were recalled from office, and the position of City Attorney remained vacant on the date of publication of the subject articles.

Monterey Peninsula Herald reporter Milton Jaques, on special assignment, spent one month investigating Weingarten's activities prior to writing the September 9, 1971, article. Jaques could identify at trial at least one source for each statement made in the article, and no evidence of unreliability of these sources was presented. Respondents Block, Jaques and Gifford each believed the statements concerning Weingarten to be true, both at the time of publication and at the time of trial. There is no indication in the record that respondents either knew any of the statements were false, or entertained any serious doubts as to their truth.

ARGUMENT

I

REVIEW BY THE UNITED STATES SUPREME COURT ON A WRIT OF CERTIORARI IS NOT A MATTER OF RIGHT, BUT OF DISCRETION, AND WILL BE GRANTED ONLY WHEN SPECIAL AND IMPORTANT REASONS WARRANT FURTHER ACTION

Rules of the Supreme Court, Rule 17, provides that "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor . . . ."

Supreme Court Rule 17 sets forth the character of the special and important reasons justifying assumption of jurisdiction by the Supreme Court: Certiorari may be granted because of a conflict between the decision of the state court and those of the United States Supreme Court, of a federal court of appeal, or of a court of another state, or because the state court has decided an important question of federal law which has not been, but should be, decided by the United States Supreme Court. Rule 17.

A review of the Petition for Certiorari filed in this matter reveals no such special and important reasons for granting a writ and, as shown below, no such reasons are presented by the record. The judgment of the California court is consistent with both federal and State law, and correctly applies the settled decisions of the United States Supreme Court concerning important questions of constitutional law arising in this state tort action for libel.[3]

II

THE PETITION FOR HEARING FAILS TO STATE SPECIAL AND IMPORTANT REASONS FOR REVIEWING THE CALIFORNIA COURT'S DETERMINATION THAT PETITIONER WAS A PUBLIC OFFICIAL AND A PUBLIC FIGURE

The United States Supreme Court in *Gertz v. Welch* (1974) 418 U.S. 323, 41 L.Ed.2d 789, defined three classes of defamation plaintiffs to whom the constitutional privilege set forth in *New York Times v. Sullivan, supra,* applies: (1) public officials, (2) those whose general fame or notoriety makes them public figures for all purposes, and (3) those who have thrust themselves into, or who have been involuntarily drawn into, a particular public controversy, making them public figures for a limited purpose.

The *Gertz* classification, based upon the personal status of the plaintiffs, has been uniformly accepted and followed by all courts. See e.g. *Time, Inc. v. Firestone* (1976) 424 U.S. 448, 47 L.Ed.2d 154; *Hutchinson v. Proxmire* (1979) 443 U.S. 111, 61 L.Ed.2d 411; and *Wolston v. Readers Digest Association, Inc.* (1979) 443 U.S. 157, 61 L.Ed.2d 450.

Applying the considerations set forth by this Court in *Gertz v. Welch, supra,* and related cases, the trial court

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[3]For general discussion see "Annotation, Progeny of *New York Times v. Sullivan* in the Supreme Court" (1980) 61 L.Ed.2d 975.

found on the evidence before it that Weingarten was both a public official and a public figure. (See Conclusions of Law Numbers 1, 2 and 3, Petitioner's Exhibit B, at page 6). The California Court of Appeal affirmed the determination of the trial court, holding that the court's findings were supported by substantial evidence. (See Opinion of the Court of Appeal, petitioner's Appendix C, at page 14).

A. The California Court Correctly Determined That Petitioner Was a Public Official

Petitioner's argument that Weingarten was not a public official (Petition pages 10-13) concerns solely evidentiary issues and baldly states that the record does not support the determination made by the California court.

In seeking review before this Court, petitioner does not allege any inconsistency between the decision of the California court and the decisions of the United States Supreme Court, the federal appellate courts, or the courts of other states. Nor does petitioner assert as a reason for seeking review that an unsettled question of federal law has been improperly decided by the California State court. Petitioner's argument exclusively addresses the sufficiency of the evidence to support the judgment, a matter which has been thoroughly and carefully reviewed by the California Court of Appeal and decided adversely to Petitioner. No special or important question is raised by this Petition, and a second review of the evidence by this Court is not warranted.

The rule is settled that findings of fact by a state court are normally accorded deference by this Court on review, even where a question of fact may have constitutional significance, and the Supreme Court is not inclined "to canvass the record" to make factual determinations in the first instance. See *Time, Inc. v. Firestone, supra,* 424 U.S. at pages 463-464.

In addition, where the Supreme Court has before it findings of fact authenticated by the highest court of the state, this Court can reject those determinations only if they are so unwarranted as to constitute a palpable invasion of the constitutional guarantee invoked. *Local Union No. 10, United Association of Journeymen Plumbers and Steamers of the U.S. and Canada of A.F.L. v. Graham* (1953) 345 U.S. 192, 97 L.Ed. 946.

Even should this Court engage in a review of the record, it would find that substantial evidence supports the determination that Weingarten was a public official, and that the law was uniformly and correctly applied by the California court in making this determination.

The question of classifying defamation plaintiffs as public officials has been addressed by the United States Supreme Court in *Rosenblatt v. Baer* (1966) 383 U.S. 75, 15 L.Ed.2d 597. There the Court states, at page 270, as follows:

> "There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, less criticism of government itself be penalized. It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."

The right of the public to criticize those responsible for government extends "to anything which might touch on an official's fitness for office." *Garrison v. Louisiana* (1964)

379 U.S. 64, at page 77, 13 L.Ed.2d 125. This Court in *Gertz v. Welch, supra,* states as follows at 418 U.S. 344.

> "Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."

The record establishes that Weingarten served as City Attorney for the cities of Seaside and Gonzales for periods of fifteen and nineteen years, respectively, and as the only local attorney for the Seaside Redevelopment Agency from its inception in 1963 until and after the date of trial (Findings 1 through 4, petitioner's Exhibit B, at page 2).

Weingarten represented the City of Seaside in over two thousand court cases, and gave advice to the City Council at their public meetings concerning the conduct of City affairs. Weingarten also received much publicity in his role as Seaside's attorney, as shown by the voluminous file of newspaper articles concerning Weingarten of which the court took judicial notice (a list of these articles is attached hereto as Appendix A).

Weingarten clearly had, or at the very least appeared to the public to have, substantial responsibility and influence over the conduct of government in Seaside. The court, therefore, correctly found Weingarten to be a public official in accordance with the settled opinions of the United States Supreme Court in *Rosenblatt v. Baer, supra,* and in *Garrison v. Louisiana, supra.*

The determination of the California court that Weingarten was a public official is consistent with the decisions of the federal courts, and the courts of other jurisdictions. As noted by the California Court of Appeal in its Opinion, authorities in other jurisdictions agree that City Attorneys or attorneys performing similar duties are public officials for purposes of the *New York Times* rule. (Petitioner's

Appendix C, at page 18). See *Finkel v. Sun Tattler Co., Inc.* (Fla.App. 1977) 348 So.2d 51 (former City Attorney); *Frick v. McEldowney* (1971) 275 N.E.2d 337 (attorney employed by town); *Tunnell v. Edwardsville Intelligencer, Inc.* (1968) 241 N.E.2d 28, reversed on other grounds, 252 N.E.2d 535; *Ewald v. Roelofs* (1970) 256 N.E.2d. 89.

In addition, in *Henry v. Collins* (1965) 380 U.S. 356, 13 L.Ed.2d 892, the United States Supreme Court assumed that a County Attorney was a public official within the *New York Times* rule.

As the Opinion of the California Court of Appeal further points out, the case of *Zeck v. Spiro* (1966) 276 N.Y.S.2d 395, the only contrary authority relied upon by petitioner, turned on the finding that the alleged defamatory statement did not pertain to official conduct, rather than the status of the plaintiff as a public official. (See Opinion, petitioner's Appendix C, at page 18, footnote 7).

In thus reviewing the applicable law of all jurisdictions, it is clear that the decision of the California court that Weingarten was a public official is consistent with the decisions of other courts, and with the settled opinions of the United States Supreme Court.

B. The California Court Correctly Determined That Petitioner Was a Public Figure

The *New York Times* rule was initially extended by the United States Supreme Court to apply to "public figures," as well as to public officials, in the case of *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, 18 L.Ed.2d 1094. There, the court notes that a rational distinction cannot be found between public officials and those public figures who often play an influential role in ordering society. Thus, society has a legitimate and substantial interest in the conduct of

these persons which is as crucial as the interest in the conduct of public officials.

Two types of public figures have been defined by this Court in *Gertz v. Welch, supra*: (1) public figure for all purposes, and (2) public figure for a limited purpose. Based upon the evidence before it, the California court correctly determined that petitioner was a public figure under both classifications at the time of publication of the subject articles.

(1) Weingarten Was a Public Figure for All Purposes

The California court found that the petitioner not only enjoyed significantly greater access to news media because of his public stature, but that he had asumed a role of special prominence in the affairs of the community of Seaside, and occupied a position of persuasive power and influence which caused him to attain pervasive fame and notoriety in the community. (Findings 9 and 10, petitioner's Appendix B at page 4). This finding is consistent with the recent decisions of the United States Supreme Court, federal courts, and the courts of other jurisdictions.

Initially, it should be noted that petitioner's general fame or notoriety, as defined by the court in *Gertz,* need only extend to the "community" in which the petitioner is involved or to which the publication is directed. Unlike the plaintiff in *Gertz,* who was the subject of a national media publication, the Monterey Peninsula Herald publication reached only the local area which is coextensive with Weingarten's general fame and notoriety. The publication of over two hundred articles concerning Weingarten during the five years prior to publication of the subject articles is competent evidence that Weingarten received considerable publicity, and had attained the status of a public figure for all purposes. See *Rosanova v. Playboy Enterprises, Inc.* (1976) 411 F.Supp. 440; *Franklin v. Benevolent Order of Elks* (1979) 97 C.A.3d 915, 159 C.R. 131.

Petitioner's status as a public figure for all purposes is established by his own testimony that he had served as City Attorney for the cities of Seaside and Gonzales, that he currently served as attorney for the Seaside Redevelopment Agency, that he was a member of the Democratic Central Committee, that he had been a candidate for public office, that he was president of the Seaside Rotary Club, that he spoke as a "civic leader" in the community, that he was active in the Naval District Board, and that he received "a great deal" of newspaper coverage upon his termination as Seaside City Attorney, and upon the subsequent recall election, that he was active in real property investments, in civic groups, and in teaching at local colleges. Weingarten's public involvement in the community was, therefore, not at all "involuntary" and he enjoyed a prominent and influential position in the Monterey Peninsula area.

(2) Weingarten Was a Public Figure For a Limited Purpose

As the court pointed out in *Gertz v. Welch, supra,* at page 345,

> "Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment."

After Weingarten's controversial discharge from the position of City Attorney of Seaside, Weingarten thrust himself to the forefront of that controversy by representing a corporation organized for the sole purpose of recalling from office those members of the Seaside City Council who had voted for his discharge. In addition, he remained the only local attorney for the Seaside Redevelopment Agency

for the duration of this controversy, despite public demands for his discharge from that position. Thus, the California court correctly determined that Weingarten was a public figure for the limited purpose of the public controversy initiated by his termination from the office of City Attorney and the subsequent campaign which successfully recalled three of the four City Council members who voted for his discharge.

The decision of the California court is consistent with the decisions of this Court and of other jurisdictions. See *Transworld Accounts, Inc. v. Associated Press* (N.D. Ga. 1977) 425 F.Supp. 814 [plaintiff collection agency held to have voluntarily injected itself into controversy involving FTC complaint], *Grzelak v. Calumet Publishing Co., Inc.* (7th Circuit, 1975) 543 F.2d 579 [a "political patronage employee" was held to be a public figure]; *Hotchener v. Castillo-Puche* (2nd Circuit, 1977) 551 F.2d 910 [author of book about Hemingway is public figure]; *Buchanan v. Associated Press* (D.C., 1975) 398 F.Supp. 1196 [accountant for Committee to Reelect President Nixon is a public figure]; *Fram v. Yellow Cab Co.* (WD Pa. 1974) 380 F.Supp. 1314 [president of taxi cab company is a public figure]; and *Carey v. Hume* (D.C., 1975) 390 F.Supp. 1026 [former attorney for Teamsters Union is a public figure]; and *Orr v. Argus-Press Co.* (6th Circuit, 1978) 586 F.2d 1108 [attorney charged with Securities Law violation is a public figure].

See also the following decisions from the courts of other jurisdictions: *Mobile Press Register, Inc. v. Faulkner* (Ala. 1979) 372 So.2d 1282 [prominent politician and community leader is a public figure], *Gleichenhaus v. Carlyle* (Kan. 1979) 597 P.2d 611 [campaign contributor who later received government contracts is public figure], and *Wright v. Haas* (Okla. 1978) 586 P.2d 1093 [member of civic organ-

ization labeling himself a radical in a letter to newspaper is a public figure].

The Opinion of the California Court of Appeal specifically addresses and distinguishes the recent decisions of the United States Supreme Court in *Hutchinson v. Proxmire* (1979) 443 U.S. 111, 61 L.Ed.2d 411, and in *Wolston v. Readers Digest Association, Inc.* (1979) 443 U.S. 157, 61 L.Ed.2d 450. (Opinion, petitioner's Appendix C at pages 19-21).

In holding that the plaintiff in *Hutchinson v. Proxmire, supra,* was not a public figure, the court notes that Hutchinson had not "thrust himself or his views into public controversy to influence others." (61 L.Ed.2d at page 431). Plaintiff Hutchinson was an obscure research scientist who received government grants for the study of animal behavior. The only "controversy" involved general public expenditures, not scientific research, and the plaintiff had never entered into a controversy concerning his funding prior to publication of the alleged libel.

Unlike Hutchinson, who was not at all in the public view, Weingarten was a "civic leader" who involved himself in Seaside's city government and activities for a twenty-year period prior to publication of the subject articles. Also, unlike Hutchinson, Weingarten thrust himself to the forefront of the public controversy in Seaside that arose at the time of his termination, and continued throughout the movement to recall members of the City Council, and the filling of the vacancy created by Weingarten's discharge from the position of City Attorney. The public had a legitimate concern about the public expenditures made to Weingarten over the years, which under *Hutchinson* does not in itself render him a public figure, but provides substantial evidence of his public status.

The Opinion of the California court is also consistent with the Opinion of this Court in *Wolston v. Readers Digest*

Association, Inc., supra. Unlike Weingarten, the plaintiff Wolston had been accused of espionage activities in 1958, and had failed to respond to a grand jury subpena; a "flurry of publicity" resulted at that time, but thereafter Wolston succeeded in returning to the private life he had led prior to the issuance of the subpena. (61 L.Ed.2d at page 457). Also unlike Weingarten, the plaintiff in Wolston was "dragged unwillingly into the controversy" and limited his involvement to that necessary to defend himself of a contempt charge (61 L.Ed.2d at page 460). Weingarten, on the other hand, remained in the public eye since the 1950's, and did not retreat to the life of a private citizen. Further, Weingarten thrust himself into the controversy involving his discharge, and he sought and received extensive media coverage and comment during the years of his public involvement.

The decision of the California court is, therefore, not inconsistent with the settled decisions of the United States Supreme Court, or with the decisions of the federal courts, or the courts of other jurisdictions. Petitioner makes no showing of lack of uniformity of decision, nor does he show that an important question of law with respect to the public official-public figure issue is unsettled. Therefore, the Petition for Hearing should be denied.

III

THE PETITION FOR HEARING FAILS TO STATE SPECIAL AND IMPORTANT REASONS FOR REVIEWING THE CALIFORNIA COURT'S JUDGMENT OF NONSUIT

The California Court granted defendants' motion for nonsuit at the close of Plaintiff's evidence on the ground that plaintiff had failed to prove by clear and convincing evidence that defendants published the subject articles

with actual malice. (See Judgement, Petitioner's Appendix A).

The law is well established that once the libel plaintiff is characterized as a public official or a public figure, the constitutional privilege enunciated in *New York Times v. Sullivan, supra,* applies and the plaintiff must prove by clear and convincing evidence both that the publication was false, and that the defendants published with knowledge of falsity or with reckless disregard for truth. As this Court stated in *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 43 L.Ed.2d 328, at page 490:

> "The defense of truth is constitutionally required where the subject of the publication is a public official or a public figure. What is more, the plaintiff public official or public figure must prove not only that the publication is false, but that it is knowingly so or was circulated with reckless disregard for its truth or falsity."

In interpreting the definition of "actual malice" as used in the *New York Times* rule, the courts have uniformly held that a plaintiff must show the defendant's state of mind by proving false publication with knowledge of falsity, or while entertaining serious doubts as to the truth. This court has defined reckless disregard for truth or falsity in the case of *St. Amant v. Thompson* (1968) 390 U.S. 727, 20 L.Ed.2d 262, as follows at page :

> "These cases are clear that reckless disregard is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

This Court in *Garrison v. Louisiana* (1964) 379 U.S. 64, 13 L.Ed.2d 125, held that to prove actual malice, the plaintiff must show clear and convincing evidence of "a high degree of awareness of probable falsity." As the California Court of Appeal points out in its Opinion, defining actual malice under the *New York Times* rule concentrates on the defendant's attitude toward the truth or falsity of the material published, and does not focus on the defendant's attitude toward the plaintiff. (Opinion, petitioner's Appendix C at page 24).

Even viewing the record in the light most favorable to Weingarten,[4] the California court correctly held that Weingarten failed to prove actual malice by clear and convincing evidence. (See, Judgment, petitioner's Appendix A, and Opinion, petitioner's Appendix C at pages 23-32).

Initially, the record discloses that the Herald reporter, Milton Jaques, made a lengthy and careful investigation prior to publication of the September 9, 1971, article. At trial, Jaques could name at least one source for each statement in the article. Respondents have set forth as Appendix B to this brief a partial listing of Jaques sources for some of the statements complained of by Weingarten.

No evidence on record indicates that any of Jaques' sources were unreliable, or that Jaques had reason to doubt their veracity. Where there is no "indicia of unreliability" in the reporter's sources, the publication is not reckless. See *Hotchner v. Castillo-Puche, supra,* 404 F. Supp. 1021 (jury verdict for plaintiff reversed 551 F.2d 910).

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[4]The standard employed by the California court in reviewing the evidence was the strict standard set forth in *Guam Federation of Teachers v. Ysrael* (9th Circuit, 1974) 492 F.2d 348, discussed *infra* at pages 20-21.

Moreover, Jaques' failure to interview Weingarten himself does not constitute actual malice. See *Rosenbloom v. Metromedia* (1971) 403 U.S. 29, 29 L.Ed.2d 296.

Petitioner's argument that the publication was reckless because respondents had no "news hook" is also without merit. The evidence on record shows that there was a substantial "news hook" on September 9, 1971, for publication of an article concerning Weingarten: the City Attorney's seat from which he was discharged remained vacant, he had served as City Attorney for over fifteen years prior to his discharge, he had participated in the recall movement which successfully recalled from office the Council members who had voted for his discharge; in August of 1970 the newly-constituted City Council began their search for a new City Attorney for Seaside, and according to representatives at City Hall, Weingarten's name had not been excluded as a possible choice for that position. Taken in this context, the article of September 9, 1971, was newsworthy in light of the ongoing public controversy concerning the position of City Attorney, and the lively public interest in filling the vacant City Attorney seat.

Nevertheless, as the opinion of the Court of Appeal points out, "hot news" elements are of little consequence when such a thorough and lengthy investigation of the subject has been made. (Opinion, petitioner's Appendix C, at page 27). Respondents needed no "news hook" to justify publication of a newsworthy story about the conduct of a public official and a public figure; as stated by the court in *Edwards v. National Audubon Society* (2nd Circuit, 1977) 556 F.2d 113, at page 120, a publisher needs no "news hook" to publish accusations made regarding a public official or a public figure since "what is newsworthy about such accusations is that they were made." The First Amendment protects the reporting of such charges, regardless of the reporter's private views regarding their

validity. *Id.* However, the record in this case shows that respondents believed the statements to be true at the time of publication, and at the time of trial.

Many of the statements contained in the subject article discuss judicial proceedings involving Weingarten; but inaccuracies in reporting judicial proceedings do not constitute actual malice. *Time, Inc. v. Pape* (1971) 401 U.S. 279, 28 L.Ed.2d 45.

Petitioner's argument that Mr. Jaques' memorandum of a conversation with Myron Etienne (set forth verbatim in Petition, footnote 1 at page 9) establishes clear and convincing evidence of actual malice is equally without merit. The record shows that Etienne was the source of Jaques' statement that the Bar Association had considered action against Weingarten because of his conduct in the Parker case, and that Etienne believed at the time of publication and at the time of trial that Weingarten "should be disciplined." Nothing in this memorandum can support a finding of respondents' knowledge of falsity or serious doubts as to the truth of the publication.

In conclusion, the record disclosed that petitioner has failed to show clear and convincing evidence of respondents' knowledge of falsity or reckless disregard for truth. To the contrary, the evidence shows that the reporter has traced every statement to an identifiable source, that respondents believed the statements to be true, and that respondents had no grounds to suspect that the statements might be false. Therefore, the judgment of nonsuit was properly entered by the California court, and no inconsistency or unsettled question concerning actual malice has been raised by the Petition for Certiorari.

IV

DETERMINATION OF PETITIONER'S RIGHT TO A JURY TRIAL IN STATE COURT AND THE PROCEDURAL REQUIREMENTS FOR A MOTION FOR NONSUIT ARE NOT WITHIN THE JURISDICTION OF THE UNITED STATES SUPREME COURT, AND WERE PROPERLY DECIDED BY THE CALIFORNIA COURT

A. The Right to a Jury Trial in State Court is a Matter of Local Law

Petitioner raises as error that he was denied a jury trial because the trial judge determined his status as a public official and a public figure prior to submitting further evidence to the jury. (Petition, at page 16). However, the right to a jury trial in state court is a matter of local law, and the United States Supreme Court accepts the decision of the highest court of the state in this regard. See *Southern Railroad Co. v. Durham* (N.C. 1924) 266 U.S. 178, 69 L.Ed. 231.

In addressing the issue of a state's failure to submit the question of fault in a libel case to the jury, this Court simply states in *Time, Inc. v. Firestone, supra,* 424 U.S. 448 at page 461:

> "The First and Fourteenth Amendments do not impose upon the states any limitation as to how, within their own judicial system, fact finding tasks shall be allocated."

Nevertheless, the question as to whether the trial court or the jury may properly determine the plaintiff's status as a public official or public figure has been settled by this Court in the case of *Rosenblatt v. Baer, supra,* where the court states at page 88:

> "We remark only that, as in the case with questions of privilege generally, it is for the trial judge in the

first instance to determine whether the proofs show [plaintiff] to be a 'public official.' "

This procedure has been followed in federal cases applying the *New York Times* privilege, and in cases of other jurisdictions. See *Meeropol v. Nizer* (2nd Circuit, 1977) 560 F.2d 1061, *Rosanova v. Playboy Enterprises, Inc., supra,* 411 F.Supp. 440, *Hotchner v. Castillo-Puche, supra,* 404 F.Supp. 1041, and *Mobile Press Register, Inc. v. Faulkner, supra,* 372 S.2d 1282 [there the court notes that "without making this determination, the trial court cannot know how to properly instruct the jury." at page 1284].

B. The Procedure for Determining the Motion for Nonsuit Was Properly Decided By the California Court

Petitioner argues at page 16 of his petition that the California court did not apply the proper standard in determining defendants' motion for nonsuit. However, both the trial court and the California Court of Appeal expressly adopted and applied that standard set forth in *Guam Federation of Teachers v. Ysrael, supra,* 492 F.2d 489, cert. denied 419 U.S. 872, 42 L.Ed.2d 111, which is the standard urged by petitioner. The California court rejected the standard set forth in the concurring opinion of Justice Wright in *Wasserman v. Time, Inc.* (D.C. Circuit 1970) 424 F.2d 920, cert. denied 398 U.S. 940, 26 L.Ed.2d 273, which would have allowed the trial court to judge the credibility of witnesses and to draw its own inferences from the evidence. The standard applied by the California court, as set forth in *Guam Federation of Teachers,* provided that all inferences must be drawn in favor of the plaintiff. (See Opinion, petitioner's Appendix C, at pages 21-23).

Thus, the California court properly determined the applicable standard of review under local law, but even had

some error occurred in this respect, it would operate to petitioner's advantage in that every inference was drawn in his favor.

It is well settled that the power of the United States Supreme Court extends only to correction of the state court's judgment to the extent that it incorrectly adjudges federal rights. *Zacchini v. Scripps-Howard Broadcasting Co.* (1977) 433 U.S. 562, 53 L.Ed.2d 965. Therefore, the jurisdiction of this Court does not extend to review of the California court's determinations as to procedure, which did not involve a federal right or give rise to a federal question. The California court properly determined the appropriate standard of review, and properly granted the respondents' motion for nonsuit based upon the First and Fourteenth Amendments to the Constitution.

CONCLUSION

The time has come to terminate this litigation. Despite a succession of court proceedings in which respondents' constitutional rights have been consistently upheld, respondents have borne the burden of this litigation for a period in excess of eight years. The cost to respondents and to the public which they serve is incalculable, for at stake here is the survival of vital First Amendment rights of free speech and free press.

As this Court stated in adopting the constitutional principles applied here, in *New York Times v. Sullivan, supra,* 376 U.S. 254 at page 279:

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."

The petitioner Weingarten was clearly a public official and a public figure, and respondents published the subject articles in good faith, believing them to be true. The California court, therefore, determined that judgment for respondents is constitutionally required in this case. That decision is in harmony with the settled principles of law decided by this Court, and with the decisions of both the federal appellate courts and the courts of other jurisdictions.

For these reasons, respondents respectfully submit that this Petition for Certiorari should be denied.

Respectfully submitted,

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(Appendices follow)

APPENDIX A

List of press articles concerning Saul Weingarten

The following articles appeared in The Monterey Peninsula Herald newspaper unless otherwise indicated:

EXHIBIT "A"

"Civic Leader to Talk At Church in Round"—June 20, 1962

"Weingarten Is Delegate"—April 4, 1963

"Seaside Pays Attorney $6,106 In Three Months"—October 27, 1964

EXHIBIT "B"

"Bid to Oust Weingarten Is Denied"—January 29, 1971

EXHIBIT "C"

"Legal Move May Still Recall"—February 23, 1971

EXHIBIT "D"

"Seaside Resumes Attorney Hunt"—August 5, 1971

EXHIBIT "E"

"Seaside's Era Of Change Recalled By Weingarten"—October 14, 1970

EXHIBIT "F"

"Rotarians Elect Weingarten"—February 9, 1971

EXHIBIT "G"

"The Weingarten Case"—February/March 1968 *(Carmel Advocate)*

EXHIBIT "H"

"Renewal Wins Suit in Seaside"—January 4, 1967

"Pigeons A Problem In Seaside"—January 20, 1967

"'Stay Active,' Speaker Tells Seaside Rotary"—February 1, 1967

"UR Lot Size Worry to Haddad"—February 3, 1967

"Seaside Anti-UR Petitions 'Invalid' "—February 14, 1967
"Anti-renewal Pleas Rejected"—February 17, 1967
"UR Merciful to Couple Who Lost Home"—March 1, 1967
"CDC Meeting on Key State Issues Tomorrow"—March 3, 1967
"Seaside Renewal In Court"—March 15, 1967
"Seaside Concerned About P.G. Stand"—May 5, 1967
"Fiery Session Of Seaside UR"—July 11, 1967
"Partial Cure for a Seaside Eyesore"—July 27, 1967
"Sale of Lots in Seaside Approved"—August 31, 1967
"New Attorney Joins Seaside Law Firm"—September 14, 1967
"UR Attorney Contract Challenged, Approved"—October 25, 1967
"Seaside UR Praises Goblirsch"—October 25, 1967
"Seaside Apartment Plan Shown"—October 31, 1967
"Burning Ban Battle In Seaside"—November 3, 1967
"Convention Center Studied"—November 4, 1967
"Seaside Sued by Planner"—November 7, 1967
"Seaside Variance Trial Underway"—December 2, 1967
"Seaside Employes Honored"—December 8, 1967
"Fort Ord Cordial To Annexation Proposal"—December 8, 1967
"Variance Trial Continued"—December 9, 1967
"Seaside Wins Suit"—December 28, 1967
"Laguna Grande Plan Nudged By City Council in Seaside"—January 5, 1968
"Convention Center to Be Session Topic"—January 17, 1968
"Seaside Councilman Replaced by Bob Bratt"—February 2, 1968
"Convicted Poisoner Of Cat Fined $190"—February 8, 1968

"Laguna Grande Petition Too Late to Qualify, Council Told" ..... February 16, 1968
"Supervisors Deny Appeal for Salinas Area Low-Cost Housing Project" ..... February 28, 1968
"Weingarten Confidence Vote" ..... March 22, 1968
"Attorney Answers Lawsuit" ..... March 22, 1968
"Attorney Charged In Court Findings" ..... April 1, 1968
"Demand for Attorney's Suspension Renewed" ..... April 5, 1968
"Council Stands by Weingarten" ..... April 19, 1968
"Weingarten Asks New Trial for Malpractice" ..... April 18, 1968
"Hearing Scheduled for May 10 on Retrial Motion by Weingarten" ..... April 30, 1968
"No Decision Yet on Annexation of Ord" ..... May 1, 1968
"Weingarten Granted Conditional Retrial" ..... May 11, 1968
"Charges Hurled at Seaside UR" ..... May 14, 1968
"Seaside Adopts Plan For Street Lighting" ..... May 18, 1968
"Damages Reduced By Judge" ..... May 29, 1968
"Seaside Council Votes Own Pay" ..... July 4, 1968
"On Police Chief" ..... July 26, 1968
"Council to Oppose Water Rate Increase" ..... September 6, 1968
"Seaside Wins Long Campaign" ..... September or October, 1968
"Jury Boosts Award For Seaside UR Land" ..... November 1, 1968
"Seaside Rejects AMBAG" ..... November 8, 1968
"Commercial Zone Approved in Seaside" ..... November 23, 1968

"Planners Lose Another Issue to Seaside Council in Bull Session" ..... December 6, 1968
"Seaside Planners Face a Problem" ..... December 10, 1968
"The Kiwanians Praised for Participation in Housing Project" ..... January 22, 1969
"Seek New Dance Law In Seaside" ..... February 7, 1969
"Night Club Agrees to Leave Gateway Center" ..... February 26, 1969
"Seaside Library Site" ..... March 21, 1969
"Streets Abandoned by Seaside Council Action" ..... March 21, 1969
"Seaside Soon the 'Largest' " ..... March 26, 1969
"Apartment Move Rejected" ..... April 4, 1969
"Seaside Tempers Flare" ..... April 4, 1969
"Hire Coons As Seaside Consultant" ..... April 4, 1969
"Seaside Housing Suit Filed" ..... April 23, 1969
"Credit Reduction Plea Denied by UR" ..... April 23, 1969
"Seaside UR Work Continues Despite Court Order" ..... April 26, 1969
"Seaside Housing Lawsuit Studied by Federal Judge" ..... May 2, 1969
"Seaside Budget-cutting Session" ..... May 6, 1969
"Youth Government Disillusioned" ..... May 6, 1969
"Seaside Redevelopment Votes Consultant For Project" ..... May 28, 1969
"Seaside Planners Seek to Combine Jobs With Beauty" ..... May 29, 1969
"Seaside Moves Sign Deadline" ..... July 4, 1969
"Commission Acts on Seaside UR Projects" ..... July 10, 1969
"Seaside UR Agency Ordered to Court" ..... July 23, 1969
"Seaside to Negotiate Recreation Study Cost" ..... August 22, 1969